Central Law Journal.

ST. LOUIS, MO., OCTOBER 29, 1909.

ENJOINING ARGUMENT BY PERSUASION TO INDUCE ONE TO JOIN A LABOR UNION.

In the case of Hitchman Coal & Coke Company v. John Mitchell, et als., Judge Dayton, of the United States Circuit Court for the Northern District of West Virginia, lately refused to modify a temporary injunction against the United Mine Workers of America. The modification asked for was to leave the defendants free to use argument, reason and persuasion to induce the employees of plaintiff to become members of such labor union, provided this be done in a peaceable and law-abiding manner, unaccompanied by intimidation, force, fraud, violence or coercion. This is the general substance of what was asked for, put in various ways to meet the exigencies in forms of expression in the restraining order.

The opinion of the judge shows, that the bill, upon which the temporary injunction was granted, alleged, that the defendants were members of an union, which the plaintiff had forbidden its employees to be members of or quit its employment, and the union "on its part, by its laws, solemnly declared that none but its members shall be employed at plaintiff's mine."

Upon this the opinion says: "It is insisted, that to ask and induce, by reason, argument and persuasion, plaintiff's employees to join a labor union is not asking them directly to violate their labor contracts." And the judge says: "It is, so far as this organization is concerned."

The judge then goes on to say that "the allegations of this bill, if true, and they must be conceded to be so upon the determination of this motion, disclose as plain a conspiracy upon the part of these defendants to injure and ruin the plaintiff as could well be conceived of."

We believe it incontestable, that if one has no right to ask and induce one, by reason, argument and persuasion to quit another's employment, so also he ought not to be allowed to thus induce one to place himself where his will will be controlled by an organization which will compel him to quit, at least, if that is the principal reason for persuasion.

But, can it be said that a labor union, which in general aspect and purpose is a lawful organization, having the right to acquire, so as to effectuate its purposes, as many members as possible, would be generally enjoined, because its officers are misusing its power as to a single individual or purpose?

There is the general right of everyone to join a lawful organization, and there is the right to restrain preconcerted effort to accomplish by organization the invasion of legal right.

If the United Mine Workers are associated in an organization to better their condition in lawful ways, does abuse of power by their governing authorities in a particular instance change it, *ipso facto*, into an illegal body, either wholly or as to any particular aim or purpose? If so, these associations seem to differ from all other aggregations of which we know. No ordinary corporation changes its complexion or character because of illegal acts of its officers, or because such acts are *ultra vires*. And if these acts constitute a misuse of corporate franchises, the state could enforce a forfeiture. As long as the state permits it to exist, it permits it to flourish as greatly as it may.

Now, we do not mean to say the federal judge erred in refusing to grant the modification prayed for, but it does seem to us that the reasoning of the judge seems specious and insufficient. The reason we think he may be right depends on intent

of the defendants in asking the modification.

If the court was persuaded that the solicitation sought was really in furtherance of the conspiracy which was charged, it was proper to refuse the modification. The judge must have believed they did not wish to exercise the right of argument and persuasion for the benefit either of laboring men or of labor orders, but because their primary purpose was to inflict injury.

Under this view the judge could rightly say, I cannot believe you are intending to do otherwise than to use a lawful organization in an unlawful way. Your argument is *ad captandum*. Your effort to cloak your purpose is like "stealing the livery of heaven to serve the devil in." A court of equity sees through your disguise.

The question then comes down to this: Should the court have granted to defendants the right to try to persuade this particular body of employees to join this labor union, when the main purpose of the attempt was to further a conspiracy such as the court held was being furthered by the defendants? No court can enjoin one from asking another to carry with him a walking cane, but if the purpose of so requesting is to carry out an unlawful design, or to invade the lawful right of another, does not the purpose affect the lawfulness of the request?

We know nothing of the merits of the allegations in the bill upon which the injunction was granted, but if there was a conspiracy, a court is short-armed, indeed, if it cannot prevent the mere use of a legal right in a particular way which stamps the use with illegality. Any other principle might have made a mockery of the injunctive relief which was sought. We do not say that the practical impossibility of confining argument and persuasion within legitimate bounds itself presented ample reason for the court's refusal, but this circumstance emphasizes the fact, that the court should have been persuaded that the modification was asked for in the utmost good faith.

NOTES OF IMPORTANT DECISIONS.

BILLS AND NOTES—DEMAND NECESSARY TO MAKE DEFAULT ON INTEREST MATURE THE PRINCIPAL.—Distinguishing between the necessity of making demand for interest, payable periodically, so as to mature the principal and the non-necessity thereof on the question of liability is the point involved in the case of Beardsley v. Washington Mill Co. (Wash.), 103 Pac. 822. The note in that case had five years to mature, except that if interest payable monthly remained unpaid, the whole sum, principal and interest, should become immediately due and collectible at the option of the holder. The place of payment was designated to be "Spokane, Wash." The court, treating this, for the case in hand, as being a failure to designate sufficiently a place of payment, accepted the rule laid down in Cox v. Bank, 100 U. S. 704. See also 1 Daniel on Neg. Ins. (5th Ed.), Sec. 90, that where no place of payment is expressed in a bill or note, the general rule, in the absence of any agreement or circumstance fixing or indicating a different intention, is that the place of presentment is the place where the acceptor or maker resides, or at their usual place of business. The maker had an established place of business in Spokane. It was shown that notice or demand for payment was sent through the mail by a bank in another state, and the maker failing to remit suit was brought for the principal and accrued interest some two years prior to maturity in due course. The defendant pleaded non-presentment at his usual place of business. The court held there was a place of payment as "specific and certain, as if named in the note at the place of business of the maker, and he was not required to go elsewhere to pay interest thereon in order to prevent the owner from exercising his option to declare the whole debt due on account of interest remaining unpaid."

It is further said: "Before the owner has the right to exercise such option, he must furnish the maker of the note an opportunity to pay at the place where the same is payable, whether that place is determinable by express words in the note or by implication of law."

We again call attention to the fact that there is here no question of primary liability, but we suppose that upon the principle decided, if suit is brought upon a note past due, but which had never been presented, no place of payment being given, the maker might, by tendering into court the amount of the principal along with an answer averring that he was able, willing and ready to pay at the time

and place of payment, escape interest and costs. Averment of such was made in the case here considered, so far as interest was concerned, and it does not appear any tender was made into court.

RECEIVERS SUING IN FOREIGN JURISDICTIONS.—I. THOSE CASES IN WHICH THE DETERMINING FEATURE IS THE KIND OF RECEIVER.*

It shall be our purpose in this discussion to attempt to point out the present state of the law on the subject, as indicated by the adjudged cases; to present what seems to us to be a fairly reasonable classification of the cases; and to indicate what we consider to be the real fundamental question involved in these cases.

A survey of the whole field would seem to indicate that, in the main, the cases on the subject may be classified under one of three heads, taking as a basis of classification the determining feature in the case, as follows:

I. Those cases in which the kind of receiver is the determining feature.

II. Those in which the parties to or affected by the suit is the determining feature.

III. Those in which the question turns upon the capacity in which the receiver sues.

The first two classes of cases represent distinct and opposite rules on the general question. The first class, mostly federal cases, represents what is generally known as the Federal Rule; and the second, mostly state cases, represents what is generally known as the State Rule. The third class is not opposed to the first two, but involves a distinct state of facts.

Our discussion shall be confined to a consideration of these three classes of cases, together with a few brief observations on what are foreign jurisdictions, and on the effect of the nature of the subject matter of the suit in determining the question.

*Part II will appear in the next issue.

1. *The Kinds of Receivers.*—In the case of Hale v. Hardon,[1] receivers are said to be of three kinds: first, "Those who are true successors in title;" second, "Those who have received title by voluntary assignment, or through involuntary proceedings in insolvency, or otherwise, underlying support from the corporation itself;" and third, " . . Those who are nothing more nor less than masters in chancery, appointed as the hand of the court, to complete the incidents of the litigation."[2] Both Beach and Smith, in their respective works on receivers, say that, originally, there was but one kind of receiver, the ordinary equity or common law receiver, appointed by a court of equity as an incident to its general powers, and who received all his powers and authority from such appointment.[3] Both writers then indicate that the original powers of courts of chancery in this respect have been greatly increased and modified by statute.[4]

This growth in the law of receivers has given rise to a class of receivers whose legal status, in the opinions of the courts, is quite different from that of the ordinary equity receiver, and, in determining whose right to sue in a foreign jurisdiction, different considerations are involved. The rise of this new class of receivers seems to be the source of much of the confusion among the cases on the subject under consideration, and so, for the purpose of this discussion, we shall consider receivers to be of two kinds:[5] 1. The ordinary equity receiver whose legal status rests solely upon his appointment by a court of chancery, and,

(1) 89 Fed. 283.

(2) This case cites as representing receivers of the second class, Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739; and Telegraph Co. v. Purdy, 162, 329, 336, 337, 16 Sup. Ct. 810; as representing the first class, Relf v. Rundle, 103 U. S. 222; and for the third class, Booth v. Clark, 58 U. S. 17 How. 322.

(3) Beach on Receivers, Sec. 3; Smith on Receivers, Sec. 1.

(4) Ibid.

(5) This, of course, is not an exhaustive classification of the kinds of receivers but only represents the kinds of receivers from the standpoint of the source of their authority. From other standpoints there are other kinds of receivers. See Beach on Receivers, Sec. 3.

2. The receiver whose legal status does not rest solely upon such appointment, of which, as may be gathered from Hale v. Hardon, supra, there are also two kinds: (*a*) The receiver who is, by virtue of statute, a true successor in title to the former owner, and, (*b*) The receiver who is at the same time an assignee, either by voluntary assignment or by assignment *in invitum*.[6]

The legal status of these several kinds of receivers will appear in our consideration of their rights to sue in foreign jurisdictions, and so we will proceed to consider their rights in this regard.

2. *The Right of an Ordinary Equity Receiver to Sue in a Foreign Jurisdiction.* —The great leading case on this phase of the subject, and in fact, upon the whole subject under consideration, is that of Booth v. Clark,[7] decided by the Supreme Court of the United States in 1854. Here, upon the filing of a creditor's bill, a receiver had been appointed by a court of equity of the state of New York. Some ten years later the receiver seeks, by a bill in equity filed in the circuit court of the District of Columbia, to secure possession of money in the hands of the United States treasurer belonging to the debtor. The debtor was a citizen of New Hampshire, and, having been adjudged a bankrupt since the filing of the creditors' bill in New York, his assignee[8] contests the right of the receiver to recover this money for the sole satisfaction of his claim. The trial court dismissed the bill upon the grounds that a foreign receiver could not sue in that court, and this decision was sustained by the supreme court. Mr. Justice Wayne delivered the opinion of the court in which he takes the position that a receiver is a mere officer of the court appointing him, having no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court;[9] that the money in his hands is *in custodia legis* for whoever can make out a title to it; that, since the orders of a court are of no force outside of its own jurisdiction, its creature, a receiver, can have no extraterritorial power of official action; that the right to maintain a suit in a foriegn jurisdiction cannot be extended to him upon the grounds of comity "without an entire departure from chancery proceedings as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of it. . ."[10]

(6) It may seem that it would have been simpler to have classified receivers as: (1) those not having title, and (2) those having title. We have not adopted this classification, because, as we shall see when we come to consider the cases following the state rule, the question of whether the ordinary equity receiver has title or not, and the extent of his title, if he has any, is an unsettled question in itself; and, as the limits of this paper will not permit us to go into this subject, we have adopted a classification which to a large extent avoids the difficulty.

For an excellent discussion of this question see Smith on Receivers, Chapter V.

(7) 58 U. S. 17 How. 322, 15 L. Ed. 164.

(8) The assignee was really not a party, having sold the effects in his hands to the defendant. However, in regard to this point the court said: "This suit, then, is substantially between Hackett, as the assignee of Clark in bankruptcy, and Booth, the receiver under Camara's creditor's bill."

(9) The appointment of the receiver here was really under authority of a New York statute. In regard to this the court said: "Whether appointed as this receiver was under the statute of New York, or under the rules and practice of chancery as they may be, his official relations to the court are the same. A statute appointment neither enlarges nor diminishes the limitations upon his action." l. c. 338.

(10) In this connection the court continues: "..If he seeks to be recognized in another jurisdiction it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that can be done upon such application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be difficult to do, where it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person to act as receiver."

In considering this case it must be carefully noted what was the exact nature of the problem before the court. Mr. Justice Wayne states the problem thus: "In other words, as an officer of a court of chancery for a particular purpose will he (the receiver) be recognized as such by a foreign judicial tribunal, and be allowed to take from the latter a fund belonging

The rule as thus laid down by the case of Booth v. Clark is still professed, at least, to be followed by the supreme court.[11] In the recent case of Hale v. Allison,[12] it was said: "We do not think that anything has been said or decided in this court which destroys or limits the controlling authority of the case," and this language was quoted with approval in the still more recent case of Great Western Mining and Mfg. Co. v. Harris.[13] A careful examination of this latter decision will afford us a more definite understanding of just what the supreme court rule is at the present time. Here a receiver of a corporation, appointed by a federal circuit court in Kentucky, seeks to sue in a federal court in Vermont to recover from stockholders the value of stock fraudulently issued to themselves. Mr. Justice Day, who delivers the opinion of the court, is careful to point out that the receiver in the case derived all his title, powers, and authority from his appointment; that no assignment had been made to him, nor was he by statute vested with title to the property of the corporation of which he was the receiver.[14] He then indicates that upon such a state of facts, and upon such facts only, the principle of Booth v. Clark is controlling, and the receiver will not be allowed to sue even upon grounds of comity.

It is thus seen that in its last important decision upon the subject the supreme court has clearly indicated that, in its opinion, the fundamental test of the right of a receiver to sue in a foreign jurisdiction is the kind of receiver, which in turn depends upon the title of the receiver, which in its turn depends upon the source of the receiver's authority.[15]

The doctrine of the case of Booth v. Clark, with the subsequent limitations upon it by the supreme court decisions, is carefully followed in the majority of the federal cases.[16] It is also followed at the present time by the decisions of the courts of the

to a debtor, for its application to the payment of a particular creditor within the jurisdiction of the receiver's appointment, THERE BEING OTHER CREDITORS IN THE JURISDICTION IN WHICH HE NOW SUES, CONTESTING HIS RIGHT TO DO SO." l. c. 330. It is obvious, then, that all the court really decided was that the New York receiver had no lien upon the property of the debtor found in the District of Columbia, which he could enforce in the courts of that District to the exclusion of all other creditors of that debtor, and that the remainder of the opinion is obiter dictum. See 6 C. L. J. 123, also Burr v. Smith, 113 Fed. 858. The case, however, is quite generally cited as authority for the broad propositions there laid down. See High on Receivers, Sec. 239; Ins. Co. v. Needles, 52 Mo. 17; Hope Mutual Insurance Co. v. Taylor, 2 Rob. 278; Moseby v. Burrow, 52 Tex. 396; Amy v. Manning, 149 Mass. 487, 21 N. E. 943; Harvey v. Varney, 104 Mass. 436 Am. & Eng. Enc. Vol. 23, p. 1107.

The court further says that even if, by virtue of the N. Y. statute, the receiver were in the position of an assignee in bankruptcy, still he could not sue, and the court then proceeds to review the English and American authorities on the rights of an assignee in bankruptcy in a foreign jurisdiction. For a discussion of this subject, see post, p. 22.

(11) Hale v. Allison, 188 U. S. 56, 47 L. Ed. 380, 23 Sup. Ct. 244; Finney v. Guy, 189 U. S. 340, 47 L. Ed. 843, 23 Sup. Ct. 558; Great Western Mining & Mfg. Co. v. Harris, 198 U. S. 561, 49 L. Ed. 1168, 25 Sup. Ct. 770. See also on status of a receiver Quincy, etc., Ry. Co. v. Humphreys, 145 U. S. 82, 36 L. Ed. 632.

(12) See citation under note (1).

(13) Ibid.

(14) In this connection the court said: "It does not appear that by order of the court or otherwise there has been any conveyance of the property and assets of the company to the receiver, nor has the corporation been dissolved, and the receiver made its successor, entitled to its property and assets.... Nor is our attention called to any statute vesting the title of the corporation in the receiver. So far then, as the receiver is concerned, his right to prosecute the action must depend upon his powers as such officer of the court and the order of the court set forth in the statement of facts, authorizing him to bring suits against the stockholders and directors for the purpose of releasing the assets, either in his own name or that of the corporation, as may be proper."

(15) The best statement of the federal rule that we have found in any of the cases is that given in Edwards v. National Window Glass Jobbers Assn., 139 Fed. 795. The rule is there stated as follows: "The distinction apparent in all the cases is as to whether he has title or is simply appointed an agent or officer of the court under its general equity powers. In the one case, through comity, he may be allowed to maintain a suit in a foreign jurisdiction, where such a course would not conflict with local policy or the rights of creditors in such jurisdiction; while in the other his powers are limited to the jurisdiction of the court appointing him."

(16) Olney v. Tanner, 10 Fed. 104; Bringham v. Luddington, 12 Blatchf. 237, Fed. cases No. 1874; Hazard v. Durant, 19 Fed. 471; Young v. Aronson, 27 Fed. 241; The Willamette Valley, 62 Fed. 299; Philadelphia & R. Coal & Iron Co. v. Daube, 71 Fed. 583. Hale v. Hardon, 89 Fed. 283; Johnson v. Southern Building & Loan Assn., 99 Fed. 646; Wighton v. Bosler, 102 Fed. 70; Zacher v. Fidelity Trust & Safety Vault Co., 106

states of Massachusetts,[17] Delaware,[18] Iowa,[19] and Texas,[20] and in a number of the earlier decisions of the courts of some of the other states.[21]

There are quite a number of federal cases which do not follow this general federal rule, but follow rather the state rule, which recognizes that the foreign receiver of the kind now under consideration cannot sue as a matter of right, but allows him to sue where to do so will not infringe upon the rights of domestic creditors or contravene the public policy of the jurisdiction of the forum.[22] It is not strange that this should be so when we consider that the jurisdiction of the federal courts in these cases usually rests upon diversity of citizenship, and that in such cases the federal courts follow, in the main, the law of the state in which they are sitting.[23]

3. *The Right of a Receiver, Whose Legal Status Does Not Rest Solely Upon His Appointment by a Court of Equity, to Sue in a Foreign Jurisdiction.*—(*a*) The receiver who is, by virtue of statute, a true successor in title to the former owner.

The existence of such a class of receivers, their legal status, and their rights to sue in a foreign jurisdiction were first considered in the case of Relfe v. Rundle.[24] Here there was a statute of Missouri which provided that, in case of dissolution or insolvency of insurance companies of that state, the title to all the assets of the company should vest "in fee-simple and absolutely in the superintendent of the insurance department of the state," for the benefit of creditors.[25]

It was held that the state superintendent of insurance, as receiver, by virtue of this statute, of an insolvent company, could recover funds of the company in Louisiana, even as against policyholders in that state, who were seeking to have the funds there declared a trust fund for the benefit of Louisiana creditors and policyholders. The decision was placed clearly on the grounds that the receiver was not an officer of the Missouri court, deriving his authority from the court, but was the statutory successor of the corporation, deriving his authority from the statute, and being, in fact, the

Fed. 593, 45 C. C. A. 483; Sands v. Greeley, 88 Fed. 130, 31 C. C. A. 424; Hilliker v. Hale, 117 Fed. 220, 54 C. C. A. 271; Great Westren Mining & Mfg. Co. v. Harris, 128 Fed. 321, 63 C. C. A.; Edwards v. National Window Glass Jobbers Assn., 139 Fed. 795; In re Benedict, 140 Fed. 57; Fowler v. Osgood, 141 Fed. 20, 72 C. C. A. 279, 4 L. R. A. (N. S.) 842. See valuable note to this case in L. R. A. Covell v. Fowler, 144 Fed. 535.

(17) In the latest case, Homer v. Barr Pumping Eng. Co., 180 Mass. 163, 61 N. E. 883, the rule is stated thus: "The law in regard to the right of receivers to sue in their own names on claims due the corporation has often been considered, and the general rule in this commonwealth and insome other jurisdictions is that a receiver has no such right that follows him beyond the jurisdiction of the tribunal that appoints him, unless he is actually or virtually an assignee of the claim wihch he seeks to enforce." See also Iron Co. v. Webster, 163 Mass. 134, 39 N. E. 786; Ewing v. King, 169 Mass. 97, 47 N. E. 517; Hayward v. Leeson, 176 Mass. 310, 324, 57 N. E. 656, 49 L. R. A. 725; Amy v. Manning, 149 Mass. 487, 21 N. E. 943; Harvey v. Varney, 104 Mass. 436; Wilson v. Welch, 157 Mass. 77, 31 N. E. 712; Buswell v. Supreme Sitting of Order of Iron Hall, 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846; Watters v. Globe Savings Bank of Chicago, 171 Mass. 425, 50 N. E. 932.

(18) Stockbridge v. Beckwith, 6 Del. Ch. Rep. 72, 33 Atl. 620.

(19) Ayres v. Seibel, 82 Ia. 347, 47 N. W. 989; Parker v. Lamb, 99 Ia. 265, 68 N. W. 686, 34 L. R. A. 704; Wyman v. Eaton, 107 Ia. 214, 77 N. W. 865, 43 L. R. A. 695; Hale v. Harris, 112 Ia. 312, 83 N. W. 1046. None of these cases squarely decide the point, but they all show a strong tendency in favor of the federal rule.

(20) Moseby v. Burrow, 52 Tex. 396; Texas & P. Ry. Co. v. Gay, 86 Tex. 585, 26 S. W. 599, 25 L. R. A. 56; Moreau v. Du Bellett, 27 S. W. (Tex.) 503; Kellogg v. Lewis, 16 Tex. Civ. App. 688, 40 S. W. 323; Malone v. Johnson, 101 S. W. 323 (Tex.).

(21) Farmers & M. Ins. Co. v. Needles, 52 Mo. 17; Filkins v. Nunemacher, 81 Wis. 95, 51 N. W. 81; Day v. Postal Tel. Co., 66 Md. 360, 7 Atl. 610; Fitzgerald v. Fitzgerald Const. Co., 41 Neb. 495, 59 N. W. 873.

(22) Chandler v. Siddle, 3 Dill. (U. S.) 479, Fed. Cases No. 2594; Fairley v. Talbee, 55 Fed. 892; Rogers v. Riley, 80 Fed. 759; Hale v. Tyler, 104 Fed. 757; Kirtley v. Holmes, 107 Fed. 1, 46 C. C. A. 102, 52 L. R. A. 738. It is interesting to note that this case was decided by Mr. Justice Day, who afterwards wrote the opinion in Great Western Mining & Mfg. Co. v. Harris, supra, p. 8. This is just an illustration of the great conflict among the cases. Burr v. Smith, 113 Fed. 858; Lewis v. American Naval Stores Co., 119 Fed. 391; Lewis v. Clark, 129 Fed. 570, 46 C. C. A. 102; Hale v. Hardon, 95 Fed. 747, 37 C. C. A. 240.

(23) Burr v. Smith, 113 Fed. 858. This is the only case mentioning the point, but the decisions in the other cases was no doubt influenced by it.

(24) 103 U. S. 222.

(25) R. S. Mo. 1879, Sec. 6043.

corporation itself for all purposes of winding up its affairs.[26]

The rule thus announced has been followed in a number of subsequent cases[27] and is now a well settled principle in the law of receivers.

The principle underlying these decisions is clear, well defined, and is, without doubt, good law. The difficulty arises in its application, in determining just what kind of a statute it takes to make a receiver a true successor in title.

In the well-considered case of Parsons v. Charter Oak Life Insurance Co.,[28] decided by Mr. Justice Shiras, while a circuit judge, it was held that a statute which provided for the appointment of a receiver to take charge of a corporation upon its dissolution, and which imposed the duty upon such receiver of collecting the assets of the company for the benefit of creditors, made the receiver a successor to the corporation and a trustee for the benefit of creditors. A similar conclusion was reached where the statute provided that, for certain causes, the court might "Decree a dissolution of such corporation and a distribution of its effects," and that, "Thereupon the affairs of such corporation shall be wound up by and under the direction of a receiver, to be appointed by the court, and its property sold and converted into money."[29]

Thus it would seem that wherever the statute provides for the appointment of a receiver upon the dissolution of a corporation, this makes the receiver the statutory successor of the corporation and the legal owner of its property.[30] This is obviously a correct holding, for, the corporation being dissolved, the title to its property can no longer be in it, and must, therefore, be in the receiver.

Another class of statutes which are held to transfer title to the receiver are those which provide that, upon a corporation's becoming insolvent and a receiver's being appointed, either by authority of statute,[31] or under the general equity powers of the court,[32] such receiver shall proceed, under

(26) The language of the court is as follows: "Relfe is not an officer of the Missouri State court, but the person designated by law to take the property of any dissolved life insurance company of that state, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. The law which clothed him was, in legal effect, part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. As such he represents the corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. He is an officer of the state, and as such represents the state in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana, not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was, in fact, the corporation itself for all purposes of winding up its affairs." The reason for not protecting local creditors, regardless of the statute (see note to Booth v. Clark, supra, p. 8) is said to be, "The appellees when they contracted with the Missouri corporation, impliedly agreed that if the corporation was dissolved under the laws of Missouri, the superintendent of the insurance department of the state should represent the company in all suits instituted by them affecting the winding up of its affairs." See also on this point Canada Southern Ry. Co. v. Gebhardt, 109 U. S. 527.

(27) Parsons v. Charter Oak Life Insurance Co., 31 Fed. 305; American Natl. Bank v. National Benefit and Casualty Co., 70 Fed. 420; Schultz v. Insurance Co., 77 Fed. 375, 387; Sheafe v. Larimer, 79 Fed. 921; Avery v. Trust Co., 72 Fed. 700; Howarth v. Ellwanger, 86 Fed. 54; Howarth v. Angle, 162 N. Y. 179, 55 N. Y. Supp. 1108, 56 N. E. 489, 47 L. R. A. 725; Howarth v. Lombard, 175 Mass. 57, 49 L. R. A. 301.

(28) 31 Fed. 305.

(29) American Natl. Bank v. National Benefit & Casualty Co., 70 Fed. 420. As to the effect of the statute the court said: "Under this statute the effect of a judgment of dissolution and the appointment of a receiver, with respect to the property of the corporation, is not expressly declared in the statute, but it is plain that all such property is thereby transferred to the receiver, wherever it may be situated. * * * As the corporation is ended and the receiver is required to wind up its affairs and apply its property and effects to the payment of its liabilities, the legal effect is to invest him with full title to all such property and effects wherever they may be found."

(30) Parsons v. Charter Oak Life Ins. Co., 31 Fed. 305; American Natl. Bank v. National Benefit & Casualty Co., 70 Fed. 420; Schultz v. Ins. Co., 77 Fed. 375, 387.

(31) Howarth v. Ellwanger, 86 Fed. 54; Howarth v. Angle, 162 N. Y. 179, 55 N. Y. Supp. 1108, 56 N. E. 489, 47 L. R. A. 725; Howarth v. Lombard, 175 Mass. 57, 49 L. R. A. 301.

(32) Bernheimer v. Converse, 206 U. S. 516, 534, 51 L. Ed. 1176, 27 Sup. Ct. 755.

the direction of the court, to collect the stockholders' liability, if there be any.[33]

In sustaining such a holding in cases where the liability sought to be enforced is a liability over and above the par value of the stock, made available to creditors by constitutional or statutory provisions, emphasis is laid upon the fact that the fund sued for is not an asset of the corporation, but comes into being only upon the insolvency of the corporation; and that the statute, providing for the appointment of a receiver to collect such fund, gives him title to it, as trustee, for the benefit of creditors.[34] But, in a very recent case in the United States Supreme Court the receiver was held to be a "quasi-assignee" of the Relfe v, Rundle type though the statute authorized him to collect stockholders' liabilities due the corporation as well as that due the creditors, and this whether the receiver is appointed by virtue of statute or under the general equity powers of the court.[35]

A like result was reached in Hale v. Hardon,[36] though the statute, after authorizing the appointment of one or more receivers, expressly provided that, "The court may proceed, without the appointment of a receiver to ascertain the respective liabilities of such directors and stockholders, and enforce the same by judgment, as in other cases."[37] The reasoning of the court, however, on this point has been repudiated in later cases[38] and can hardly be said to represent the law.

As a general proposition, then, it may be said, from the above cases, that all that is necessary to give a receiver title by statute, so as to enable him to sue in a foreign jurisdiction, is that the statute shall authorize or recognize his appointment, and expressly empower him to do the thing which he seeks to do.

It should be noted before leaving this phase of the subject that, as appears from the cases considered, the question of the right of this class of receiver to sue in a foreign jurisdiction is not, as in the case of the Booth v. Clark class of cases, a question of procedure at all, but purely and simply a question of substantiative law.

(b) The receiver, who is also an assignee, either by voluntary assignment or by assignment in invitum.

It was said in Hale v. Hardon[39] that this was the only class of receivers, as to whose right to sue in a foreign jurisdiction there could be any question under the present condition of the decisions in the Supreme Court.[40]

The difficulty here is not due to the peculiar character of this class of receivers, but to the fact that, they being assignees, the general question of the right of the assignee in insolvency to sue in a foreign jurisdiction is raised. This question will be discussed under our next heading. It

(33) Cases under (1) and (2) supra.

(34) Cases under (1) supra.

(35) Bernheimer v. Converse, 206 U. S. 516 (for statute see 1. c. 525), 51 L. Ed. 1176, 27 Sup. Ct. 755. The court dismisses the whole point with a very few words. It cites Booth v. Clark, Hale v. Allison and Great Western Mining & Mfg. Co. v. Harris, and says: "In each and all of these cases it was held that a chancery receiver having no authority than that which would arise from his appointment as such, cannot maintain an action in another jurisdiction. In this case the statute confers the right upon the receiver as a quasi-assignee, and representative of the creditors, and as such vested with authority to maintain an action. In such cases we think the receiver may sue in foreign jurisdictions." Citing Relfe v. Rundle, 103 U. S. 222, and cases cited under note (1), p. 17.

(36) 95 Fed. 747, 37 C. C. A. 265.

(37) 95 Fed. 747, 1. c. 749.

(38) Wighton v. Bosler, 102 Fed. 70; Hale v. Tyler, 104 Fed. 757, 55 C. C. A. 681; Hale v. Allison, 188 U. S. 56, 47 L. Ed. 380, 23 Sup. Ct. 244.

(39) 89 Fed. 283.

(40) The two cases cited by this case as representing receivers of this class were, Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739; and Telegraph Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810. In the first case the receiver was a voluntary assignee and he was allowed to sue in a foreign jurisdiction without question, the point seemingly not having been raised. In the second case the receiver seems to have been nothing more than an ordinary equity receiver, and yet he, too, was allowed to sue without question. In the opinion the question was not discussed at all, and the only explanation of the case seems to be that the right of the receiver was never objected to by counsel. See observation in Great Western Mining & Mfg. Co. v. Harris, 198 U. S. 561, l. c. 577.

may be said here that the present rule in the Federal courts on this subject is, apparently, about as follows: The foreign assignee will be allowed to maintain a suit, provided, in the case of a voluntary assignee, to allow such suit will not infringe upon the rights of local creditors nor contravene the laws or public policy of the jurisdiction of the forum;[41] and, provided, in the case of a statutory assignee or assignee *in invitum*, to allow such suit will not defeat the claims of creditors of any jurisdiction, who are rightfully in the local courts, pursuing the remedies there afforded them.[42]

Thus far we have seen that there is a class of cases, mostly federal, in which the right of a receiver to sue in a foreign jurisdiction is made to depend upon the kind of receiver, which depends upon his title, which in turn depends upon the source of his authority; that, according to this rule the pure equity receiver will never be allowed to sue in a foreign jurisdiction, while the receiver having title by statute or by assignment has the same rights in this regard as an assignee in insolvency.

W. F. WOODRUFF.

University of Missouri.

(41) Security Trust Co. v. Dodd, Mead & Co., 173 U. S. 624, 43 L. Ed. 835, citing: Black v. Zacharie, 3 How. 483; Livermore v. Jenckes, 21 How. 126; Green v. Van Buskirk, 5 Wall. 307; Harvey v. R. I. Locomotive Works, 93 U. S. 664; Cole v. Cunningham, 133 U. S. 107; Barnett v. Kenney, 147 U. S. 476.

442) Security Trust Co. v. Dodd, Mead & Co., 173 U. S. 624, 43 L. Ed. 835, citing: Harrison v. Sterry, 5 Cranch 289, 302; Ogden v. Saunders, 12 Wheat. 213; Booth v. Clark, 17 How. 322; Blake v. Williams, 6 Pick. 286; Osborn v. Adams, 18 Pick. 245; Abraham v. Plestoro, 3 Wend. (N. Y.) 538; Jackson v. Hunt, 23 Wend. 87; Hoyt v. Thompson, 55 N. Y. 320; Willits v. Waite, 25 N. Y. 577; Kelly v. Crapo, 45 N. Y. 86; Barth v. Backus, 140 N. Y. 230; Weider v. Maddox, 66 Tex. 372; Rhawn v. Pearce, 110 Ill. 350; Catlin v. Wilcox Silver Plate Co., 123 Ind. 477. It should be noted in this connection that it is not because of any rule of practice that the exceptions, indicated in the statement of the rule, arise; but because, as a matter of substantive law, no title passes to the assignee in the excepted cases.

INFANCY—CONTRACT FOR SERVICES.

ROBINSON v. VAN VLEET.

Supreme Court of Arkansas, July 12, 1909.

An infant is bound by his contract for services which he has executed without dissent, and which is not so unreasonable as to show fraud or undue advantage.

This was a suit instituted by the plaintiff as next friend of John Hots, a minor, for the value of services performed by the minor for the defendant. Defendant has a verdict. In December, 1899, shortly before he became thirteen years old, Hots was taken into the home of defendant, where he was almost constantly employed in hauling, farming, and clearing in the service of the defendant until September 4, 1907, when he left as the result of a disagreement between him and defendant. Suit was brought for $900, balance alleged to be due for value of the services. Defendant's answer alleged, and his proof tended to show, that Hots practically became a member of defendant's family. The court gave, among others, the following instruction: "No. 1. One of the defenses to any recovery by the plaintiff in this suit is that the plaintiff entered and became a member of the family of the defendant, and as such was entitled to no compensation other than the common benefits enjoyed by the family. You are instructed that, if you find from the evidence that the plaintiff occupied the position of and became a member of defendant's family, and received the common benefits enjoyed by the family, you will find for the defendant unless you further find that there was an express agreement to compensate the plaintiff." Appellant excepted to the giving of this instruction. The court also gave the following: "No. 3. You are instructed that in order to find for the plaintiff it will not be necessary for you to find that there was any contract made or existing between the parties; but, if the defendant permitted the plaintiff to work for him, and if he received the benefits of his labor and made no objection to plaintiff's working for him then under these circumstances the law implies a promise to pay plaintiff a reasonable sum for such labor."

WOOD, J. (after stating the facts as above): The appellant contends that, notwithstanding a family relationship may have existed between him and the appellee, he was entitled to recover, if the facts show an implied agreement to pay him for his services, and he contends that the conduct of the parties as shown by the evidence raises an implied agreement, which rebuts the presumption that his services were gratuitous. He further contends that instruction No. 1 takes away from the consideration of the jury any evidence of an implied agreement. There is really no evidence of any implied agreement in the record. The agreement, according to the testimony of both appellant and appellee, was express, and the effect of it was that appellee should receive appellant into his household as a member of his family, and that if appellant remained until he reached his majority, he should receive a horse, bridle, and saddle and 80 acres of land. After this, when the parties differed about some work, and agreed to sever the quasi family relationship before appellant reached his majority, the agreement was that appellee should pay appellant $100 in cash for the services already rendered, which appellant accepted, and thereupon left appellee's home thus abandoning the contract as to horse, bridle, and saddle and the 80 acres of land. These facts are established by the uncontroverted evidence, and the court, therefore, did not err in giving instruction No. 1, even if it was meant by it to ignore any implied contract. But instruction No. 3, given at the request of appellant, did submit to the jury the question as to whether there was an implied contract to pay for appellant's services. Taking the two instructions together, their purport was to tell the jury to find for appellant if they believed from the evidence that there was either an express or implied contract to pay for his services. Instruction No. 3, given at the request of appellant, gives him the benefit of an implied agreement, if there was one, and was more favorable to him than the evidence warranted.

There was really no evidence to justify the court in submitting to the jury the question of the right of appellant to recover upon a "quantum meruit;" for the uncontroverted evidence shows an express contract for services which had been fully executed. The appellant had done the work, and had received the $100, in addition to the necessaries and other valuable considerations given him by appellee. There is no allegation of fraud against appellee in dealing with appellant, and there is no evidence that the amount paid by appellee for the services of appellant was not reasonable under all the circumstances of his employment. Certainly there was no evidence to show that the amount in necessaries and money received in consideration for his services was so unreasonable as to be evidence of fraud or undue advantage. Appellant did not even ask that such question be submitted to the jury. An infant is bound by the terms of his contract for services which he has executed without dissent, provided such contract, under all the circumstances of his employment, is reasonable, or not so unreasonable as to be evidence of fraud or undue advantage. Judge Cooley, in Spicer v. Earl, 41 Mich. 191, 1 N. W. 923, 32 Am. Rep. 152, quoting an earlier case, used the following language: "It is essential to the protection of infants that they should be bound by contracts of this kind after they had been executed. The idea of protection lies at the basis of the whole law of infancy. Should the law recognize the right of repudiation in such cases, no man could furnish an infant with the necessaries of life in compensation for his services without the risk of a lawsuit; and the minor, though able and willing to earn his support, would often be deprived of the opportunity, and driven, perhaps, to vagrancy and crime." Wilhelm v. Hardman, 13 Md. 140; Hobbs v. Godlove, 17 Ind. 359; 22 Cyc. p. 648.

In view of these principles, which are applicable to the facts of this record, there was no error in any of the rulings of the court prejudicial to the rights of appellant, and the judgment is therefore affirmed.

NOTE—*Power, and Extent Thereof, of Infant to Bind Himself by His Contract to Render Services.*—In Alabama it was held that the right of an emancipated infant to receive compensation for labor performed by him pursuant to his own contract, express or implied, rests on the same principle as that of an adult, with the exception that courts will scrutinize narrowly in his interest such contracts and protect him from over-reaching bargains. Waugh v. Emerson, 79 Ala. 295. Accordingly partial payments made to such an infant were held payment *pro tanto*. In an old case in Massachusetts the question as to a minor over the age of 14 years being bound by his contract made with consent of his guardian to labor until he shall come of age, in consideration of being furnished with his board, clothing and education, to the extent that afterwards he should not be allowed to maintain a *quantum meruit* for his services, where services were worth more than the stipulated compensation was considered very thoroughly, the opinion being rendered by Shaw, C. J. Stone v. Dennison, 30 Mass. (13 Pick.) 1, 23 Am. Dec. 634. Judge Shaw spoke of such a contract as being within the exception to the general rule of infant's incapacity to bind, because of its being a contract for necessaries. "Where it can always be open

to inquiry what the nature and terms of the contract were and whether the contract was reasonable and beneficial, a minor may as well be bound by an express as by an implied contract for necessaries. This is often beneficial to the minor and enables him to avail himself of any stipulations in his favor. * * * The rule that a minor shall only be bound by such a species of express contract, and in such a form of action as leaves the nature, terms and consideration of the contract open to inquiry and then only by such a contract as shall appear at the time to have been fair, reasonable and beneficial to the minor, affords a sufficient security to the rights of minors. * * * It would be injurious rather than beneficial to minors to hold that a contract thus made is of no legal force and effect." Judge Shaw, in thus speaking, had before him merely the question of the right of the minor to sue upon a *quantum meruit*, the contract being an executed one. But in the case of Spicer v. Earl, supra, Judge Cooley, though speaking with some more of emphasis than Judge Shaw on the subject of the right to repudiate being more harmful than beneficial to infants, yet, argumentatively, appears to consider that the infant is not as strongly bound in every way as an adult would be, as he says: "On the other hand, the infant may abandon the service when he pleases, or stipulate for any new terms he may see fit to demand and can procure assent to." An adult could not do this, in every instance, and not subject himself to an action on the contract to render services. This difference might stand somewhat in the way of an infant's finding an employer who would be wished to contract. In Georgia the Supreme Court held that where an infant was injured in the employment in which he was being paid wages, he was not bound by a release on a settlement, though no fraud in the settlement was alleged. This was put upon the ground that being employed as a laborer did not come within the statute making an infant practicing, by consent of his parent, guardian or permission of law, a profession or trade, or engaging in any business as an adult, bound by all contracts connected with the occupation in which he is engaged, as provided by the Georgia code. Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788. The reasoning in the opinion, after declaring the taking of such employment not to be within the statute, appears to admit that for wages actually paid the employer would stand released. Yet no incidental contract would bind the infant. If the statute is supposed to contain the rule of *inclusio unius, exclusio alterius*, this ruling would be correct, but it does not seem to us it should be so construed. Instead the statute means, that all contracts, those executed and executory, are good when entered into by an infant practicing a profession or trade, while only those executed may bind him, if not so practicing. While the Georgia court may be right, even under the cases the principal case refers to, it is only so, because the policy of what is to the interest of the infant does not place him as to labor contracts, that are executed, in the attitude of an adult. The principal case sustained a settlement, that is to say, a settlement for services. The Georgia case had the question of a settlement for injuries sustained in the rendering of services, and this—the real distinction—it touches, *argumentatively*, not at all. The case of Purviance v. Shultz, 16 Ind. App. 94, 44 N. E. 766, gives something of a fanciful reason for sustaining a contract for services to be rendered in the securing of family relations by an infant, so as to bar a suit for work and labor done. The opinion says: "It is the policy of the law to secure homes for the homeless, and it fosters and encourages all contracts, no matter by whom made, which tend to accomplish this end. An infant may make a contract of marriage which results in establishing the family relation and it is valid. The family relation is not merely a contract. It is a status. * * * To say that a homeless infant cannot secure the benefits of a home with its refining and elevating influences by his express contract, is to overthrow the policy of the law." It is such applications as this, in reasoning, to the law of contract or to the exception in case of necessaries to an infant, that confuses principle. This emotional judge ought to have expressed himself in rhyme or blank verse. In Kansas the rule, which was reasoned out by Judge Shaw, has been crystalized in a statute which reads: "When a contract for the personal services of a minor has been made with him alone, and those services are afterwards performed, payment made therefor to such minor in accordance with the terms of the contract is a full satisfaction for those services, and the parent or guardian cannot recover therefor." By its terms this provision would not embrace what was done in the principal case, and far less would it include the question before the Georgia court. See Ping M. & M. Co. v. Grant, 68 Kan. 732.

In Rhode Island it seems to have been held, though this is only a matter of inference, that while payment to a minor for services rendered at a stipulated rate may be satisfaction in full, yet a minor cannot be held to his agreement to give two weeks' notice before quitting, and may recover for services rendered after last pay day. Dearden v. Adams, 9 R. I. 217, 36 Atl. 3. Maine Supreme Court allowed an infant, who agreed to work for a stipulated amount per annum to repudiate his contract and sue upon a *quantum meruit*, and recover the balance after deducting what had been paid under the contract. Vehne v. Pinkham, 60 Me. 142. The principle involved was not much discussed, but an instruction which said he had this right of repudiation was approved. The like principle seems the rule in North Carolina, or at least to have been once so decided. Francis v. Felmit, 20 N. C. (4 Dev. & B.) 498. In Tennessee the principle of an executed contract being binding on infant is recognized, but he differs from an adult, as we have already seen, in having the right to avoid further performance whenever he chooses. Railroad v. Elliott, 41 Tenn. (1 Cold.) 611, 78 Am. Dec. 506.

The weight of authority appears to be with the principal case, at least to the extent of making actual payments for services count according to the terms of a fair contract, but that a compromise in settlement, in case of dispute, for past services is binding on an infant, seems not to have been ruled in any of the cases cited by the principal case or found in our investigation. That really was the hard question in the principal case, but this compromise feature was not specially considered a settlement for *past* services. The principal case really extends the rule which it relies on, without so saying. C.

JETSAM AND FLOTSAM.

THE FALLACY OF THE DOCTRINE OF PUBLIC POLICY.

By W. Irvine Cross of the Maryland Bar.

The doctrine of Public Policy bears about the same relation to the law that the vermiform appendix does to the body—a vestigial doctrine having little function but to start trouble.

The essence of the doctrine, so far as formulated, seems to be that a judge should not simply pass upon the rights of the parties before him, but should be considering, also, how his decision will affect the public, or how it will be looked at by it. Chief Justice Wilmot, an earnest believer in the doctrine, puts it in these words: "It is the duty of all courts of justice to keep their eye steadily upon the interests of the public, even in the administration of commutative justice." In other words, the judge is to have one eye on the rights of the parties and one eye on the public—strabismus, of course, inevitable.

Greenwood, on Public Policy, states the doctrine thus: Rule II. "But if such contract bind the maker to do something opposed to the public policy of the state or nation, or conflicts with the wants, interests or prevailing sentiment of the people, or our obligations to the world or is repugnant to the morals of the times, it is void, however, solemnly the same may be made." This would seem to be a broad charter. The most dangerous working of this principle, however, has not been where it has been openly invoked, but where it has been the silent inspiration of the court's action.

Eminent jurists have looked with disfavor upon the doctrine of public policy, and have suggested limitations that would practically substitute for it a few definite rules. Some of them have treated it as not so much a rule of legal action as a chance for the judge to indulge his individual bent, one of them making the inquiry: "Public Policy? Whose?" Baron Alderson says, in the case of Hipplewhite v. McMorine, 5 M. & W. 467: "I disclaim deciding on the ground of public policy. The policy of one man is not the policy of another, and such a consideration only tends to introduce uncertainty into law." Baron Parke, in the case of Egerton v. Earl of Brownlow, 4 H. of L. Cases, 123, says: "It is a vague and unsatisfactory term, and calculated to lead to uncertainty and error when applied to the decision of legal rights. It is capable of being understood in different senses; it may, and does in its ordinary sense mean 'political expedience' or that which is best for the common good of the community."

I have used the expression "Public Policy" to denote a persistent tendency in the popular mind, and in the judicial mind, in other words, in the human mind, to regard the judicial function as ancillary to the legislative and executive, working out any result desirable or greatly desired at the time. This feeling is older than our legal system—as old as human nature. It is the perennial enemy of the pure law.

An established right in the individual is a limitation upon the power of the majority. People are willing to leave an individual his rights so long as they have no value. When they assume a value, the tendency is to appropriate them. So far as the law has endeavored to curb this tendency, it has had a hard fight. That the individual should have any rights as against the public interest, as against the state or the government, is a modern conception. It would have been inconceivable to many of the best men of an earlier day. We are shocked when we find Machiavelli, one of the most patriotic men of his time, calmly discussing the occasions when assassination and similar methods should be used. But the avowed view of Italian statesmen in his day was that the public interest was so paramount that a public man must not be limited by the moral restrictions that govern a private man.

The same feeling, lurking, persistent, often unconscious, that the rights of the individual must give way when there is any strong public interest opposed to them, governs the decisions of many our judges. An interesting example of this tendency is found in the disposition of some of our courts to get rid of the constitutional limitations of our organic law by elastic definitions of the police power. Many of us felt a rather quaking sensation when so great a lawyer as Elihu Root lent all the force of his great name to the statement that the National Government needed greater powers, and that they must be secured by construing the constitution so as to give them.

The curbing of this tendency to ignore the rights of the individual was a prime object of those who framed our constitution. The constitutional limitations which they embodied therein are limitations which the people have set to their own hasty use of power. The people in their calmer mood set limits upon what they may do in moments of excitement. They are limitations upon what the majority may do to the individual. The principle upon which they were framed is finely stated by Mr. Justice Brewer in his address to the graduating class of the Yale Law School in 1891. "The wisdom of government is not in protecting power, but weakness; not so much in sustaining the ruler, as in securing the rights of the ruled. The true end of government is protection to the individual, the majority can take care of itself."

Set up as a defense of the individual against the majority, the constitutional limitations have had a steady fight with the old tendency. The old bottles would not hold the new wine. That the omnipotent people, state, government, should not be able to do a good thing when they wanted to do it, because of the rights of an individual, is as foreign to the idea of government held by many of our public men and some of our judges, as it would have been to Peter the Great. The fine expression I have quoted from Justice Brewer does not appeal to them. Their idea would be expressed somewhat thus: "It is a weak government that admits limitations upon its own power. It is dangerous to take away from the powers of the government in the interest of an individual."

This persistent old tendency works its way out by taking a large, we might say an exaggerated view of what is called the police power, "that power by which the state provides for the public health and public morals and promotes the general welfare." By making this broad enough we can get rid of the constitutional limitations altogether. We can realize Secretary Root's plan. If the state wants to violate the reserved rights of the individ-

ual, all it has to do is to say that its action is in the interest of the public welfare, and therefore an exercise of the Police Power.

We miss the simplicity of the old Bill of Attainder, but we accomplish the same result and on the same principle. Our courts, in the same zeal for the public welfare that led to the use of Bill of Attainder in earlier days, are gradually recovering for the state this valuable attribute of sovereignty relinquished by our constitution. Let me here again quote from the address of Justice Brewer: "It (the Police Power) is the refuge of timid judges to escape the obligation of denouncing a wrong, in a case in which some supposed general and public good is the object of legislation. The absence of prescribed limits to this power gives ample field for refuge to any one who dares not assert his convictions of right and wrong."

The Dreyfus scandal was a clear case of the working of the doctrine of public policy. All conservative France looks upon the army as the one security against revolution. The strongest kind of Public Policy demanded that the rights of a single man should not be allowed to imperil its prestige

If the courts are to be influenced by what Greenwood calls "the prevailing sentiment of the people," how far shall they go? How quickly responsive shall they be to this influence? In other words, where does the doctrine of public policy leave off, the yielding to clamor or "playing to the gallery" begin? Shall we defer only to a long continued public opinion; or act promptly on its freshest forms? In my opinion it is only a difference of degree, and the judge who allows himself to be led away from his grand, though simple function, by consideration either of general morality, the public interest or public opinion is only weakening himself against the day when he may have to face popular clamor or resist political influence.

I am sure that the strongest safeguard we can have against the recurrence of the judicial outrages that have disgraced our history in times of excitement, and may do so again, is the maintenance in the minds of judges, the strengthening in the minds of people, of the idea that the law is a controlling system, in the administration of which the judge shall be deaf to popular opinion and powerless to carry out his own views of general morality, "political expedience" or the public interest.

CORRESPONDENCE.

FEDERAL EMPLOYER'S LIABILITY ACT.

Editor of the Central Law Journal:

Mr. Burton Smith of Atlanta, writing in your issue of September 24, 1909, condemns the fellow-servant doctrine of the law of negligence as an excrescence upon the common law, originating in Murray v. Railroad Co., a South Carolina case decided in 1841, and perpetuated according to his view, by the "supineness" of courts and their inability to "break away from the unsoundness of earlier rulings." All of which has resulted, he thinks, in an "utterly confused and irrational condition."

It has become somewhat the fashion of late to decry the fellow-servant doctrine; but it might be well for the brethren so inclined to stick somewhat closer to the text, and waste less time in verbal castigation at long range.

Mr. Darrow of Chicago, in a recent address before the Cincinnati Bar Association on this subject, referred to the error of a train despatcher resulting in collision and injury to trainmen, as being a pertinent illustration of the inequity of the doctrine, because, as he declared, the fellow-servant doctrine would in such a case deprive the injured of their remedy. (sic.)

Your correspondent traces the doctrine to the South Carolina case of 1841, when, he says: "Livingston and his locomotive were only a few decades past" (sic). So very few indeed were these past decades, that it is somewhat difficult to find in them room enough for those experiences whose fruitage is a doctrine of jurisprudence that even at that early date was regarded by courts of high ability as part of the common law.

Both of these gentlemen would have been more convincing by a greater accuracy, and a more discriminating mode of statement. The principles of the doctrine have commended themselves to all our courts of last resort as rooted in sound reason and public policy, and exceptions have been made where special facts made it necessary to the attainment of justice. Individual opinion against a well-established current of judicial authority makes but a poor showing in the fantastic garb of ill-considered phase; and Mr. Smith's reference to Mr. Justice Shaw's statement that the law cannot apportion the damage due to injury, as "about as absurd a proposition as was ever uttered by a lawyer of position," is interesting only by its seeming implication that this was thought to be uttered as original doctrine by Justice Shaw.

Mr. Smith is careful to tell us of an apt retort he made to opposing counsel, recommending a close reading of a statute as interpreted by the court of last resort, as being conducive to a clear conception of it. This excellent advice Mr. Smith would do well to apply in future criticisms of a general nature upon the judiciary and established doctrines of jurisprudence.

Yours respectfully,

LEWIS M. HOSEA,

(Late Judge Superior Court of Cincinnati.)

HUMOR OF THE LAW.

A suit was pending recently before a certain justice of Oklahoma. The suit was to recover damages by reason of injury to a large shipment of books. A witness for the defendant was asked: "What was the condition of these books when they arrived?" Attorney for plaintiff objected on the ground that the question did not call for the best evidence. The learned justice said: "It is a well settled rule of law that the books are always the best evidence. Objection sustained." Thereupon the cause was continued until the following day, when the large shipment of books was, with some difficulty, brought into court and exhibited and the case proceeded to trial, which resulted in a verdict in favor of plaintiff.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

1. **Adverse Possession**—Hostile Character.—The possession of land as between the mortgagor and mortgagee is presumed not to be adverse, and the same presumption stands as between the mortgagee and the purchaser of the mortgaged property.—Stayton v. Hastain, Mo., 120 S. W. 763.

2. **Assignments**—Form.—No particular form of words is necessary to the assignment of an account or obligation, but any act showing an intention to transfer an interest for that purpose is sufficient.—Wheless v. Meyer & Schmid Grocer Co., Mo., 120 S. W. 708.

3. **Bankruptcy**—Adjudication Against Bankrupt.—Where a partnership is adjudged bankrupt on petition of a partner, a nonassenting partner, if solvent, may take upon himself the settlement of the business, reporting to the court the residuum of assets for distribution, but under general order 8 (32 C. C. A. xi, 89 Fed. vi) he must schedule his individual assets and debts.—In re Junck & Balthazard, U. S. D. C., E. D. Wis., 169 Fed. 481.

4.——Allowance of Claim.—Allowance of a claim in bankruptcy proceedings held not to deprive claimant of his right to sue on the claim.—Carr v. Barnes, Mo., 120 S. W. 705.

5.——Claims.—A purchaser of notes and accounts of a bankrupt, secured by bonds of a corporation, the stock of which was owned by such purchaser, held not entitled to have such claims allowed against the bankrupt's estate as unsecured.—In re Watertown Paper Co., U. S. C. C. of App., Second Circuit, 169 Fed. 252.

6.——Concealment of Assets.—A corporation may be guilty of concealment of assets while a bankrupt.—United States v. Young & Holland Co., U. S. C. C., D. R. I., 170 Fed. 110.

7.——Equitable Assignment.—An auctioneer, who made an advance on account of property to be sold, taking a receipt authorizing the deduction of the amount from the proceeds, held to have acquired no lien which entitled him to priority over general creditors in bankruptcy for such advance; the property having remained in the possession of the bankrupt.—In re Faulhaber Stable Co., U. S. C. C. of App., Second Circuit, 170 Fed. 68.

8.——Findings of Referee.—The weight to be given to a finding by a referee in bankruptcy, on review by the judge, depends on the character of the evidence; it being entitled to less weight, if a deduction from established facts, than if based on conflicting evidence.—In re McCrary Bros., U. S. D. C., S. D. Ala., 169 Fed. 485.

9.——Mutual Debits and Credits.—Claims arising under a contract of bailment for the transfer of the possession of a mercantile business to the bankrupts held mutual debits and credits within Bankr. Act July 1, 1898, c. 541, § 68, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450).—Walther v. Williams Mercantile Co., U. S. C. C. of App., Sixth Circuit, 169 Fed. 270.

10.——Preferences.—A preferred creditor, having been compelled to surrender its preference at the suit of the bankrupt's trustee, is entitled to prove and have his claim allowed against the estate thereafter, though more than a year prescribed for the proof of claims has expired.—In re Otto F. Lange Co., U. S. D. C., N. D. Ia., 170 Fed. 114.

11.——Withheld Assets.—An order requiring a bankrupt to pay over withheld money should require payment to the trustee, and not into the registry of the court.—In re Baum, U. S. C. C. of App., Eighth Circuit, 169 Fed. 410.

12. **Banks and Banking**—Criminal Responsibility.—Ignorance of a bank's insolvency by a cashier receiving a deposit, through negligence, held not to warrant a conviction, under Code 1906, § 1169.—Stewart v. State, Miss., 48 So. 615.

13. **Benefit Societies**—Suspension of Members.—Where there was no by-law of a mutual benefit association giving a member a right of appeal within the association against an unlawful suspension, he was entitled to resort to the courts to compel his reinstatement.—Horgan v. Metropolitan Mut. Aid Ass'n., Mass., 88 N. E. 890.

14. **Bills and Notes**—Delivery.—Delivery of a negotiable instrument is not essential to its validity in the hands of an innocent holder for value, though the maker lost possession by theft.—Worsham v. State, Tex., 120 S. W. 439.

15.——Foreign Bill of Exchange.—A draft drawn on a company without the state is a foreign bill of exchange under Negotiable Instrument Act.—Bank of Laddonia v. Bright-Coy Commission Co., Mo., 120 S. W. 648.

16.——Liability of Indorser.—The statement of an attorney for the indorsee of a note that the indorser would not be bound thereby is only the expression of an opinion as to the legal effect of the indorsement, and not the misstatement of a fact entitling the indorser to avoid liability for fraudulent representation.—Wizig v. Beisert, Tex., 120 S. W. 954.

17. **Breach of Marriage Promise**—Action Ex Contractu.—A suit for breach of a marriage contract is an action ex contractu, and not ex delicto, though it partakes somewhat of the

characteristics of the latter.—Sperry v. Cook, Mo., 120 S. W. 654.

18. **Carriers**—Bill of Lading.—A receipt by a carrier for freight received for transportation held to make the bill of lading a part of the contract of carriage.—Simmons Hardware Co. v. St. Louis, I. M. & S. Ry. Co., Mo., 120 S. W. 663.

19.——Duty to Provide Cars.—A carrier held required to anticipate and provide cars for normal conditions of the traffic.—Midland Valley R. Co. v. Hoffman Coal Co., Ark., 120 S. W. 380.

20.——Liability of Initial Carrier.—The initial carrier contracting for through carriage of freight held liable for the loss occurring anywhere on the route, notwithstanding a limitation of its common-law liability to a loss on its own line not supported by a consideration.—Simmons Hardware Co. v. St. Louis, I. M. & S. Ry. Co., Mo., 120 S. W. 663.

21.——Lien for Supplies to Tenant.—The landlord's lien for supplies to enable the tenant to make a crop is superior to a mortgage on the crop by the tenant.—Ferniman v. Nowlin, Ark., 120 S. W. 378.

22. **Chattel Mortgages**—Corporate Property.—A mortgage on the physical property of a corporation by a holder of over 85 per cent. of the capital stock held an equitable mortgage on his interest in the corporation.—Thomson v. Grace, Ark., 120 S. W. 397.

23.——Judicial Sale.—On a judicial sale of corporate stock, the chancery court has plenary power to require proper transfers on the corporation's books, to the purchaser.—Thompson v. Grace, Ark., 120 S. W. 397.

24. **Conspiracy**—Combination of Laborers.—Laborers and builders may combine so long as the motive is not malicious, the object unlawful, and the means deceitful, or fraudulent, though the result works injury to others.—National Fireproofing Co. v. Mason Builders' Ass'n, U. S. C. C. of App., Second Circuit, 169 Fed. 259.

25.——Concealment of Bankrupt Assets.—Individuals could be guilty of conspiracy to conceal assets of a bankrupt corporation, even if it could not be charged as a conspirator.—United States v. Young & Holland Co., U. S. C. C., D. R. I., 170 Fed. 110.

26. **Constitutional Law**—Right of Privacy.—The publication of a person's picture for advertising purposes held to violate the right of privacy, and actionable.—Foster-Milburn Co. v. Chinn, Ky., 120 S. W. 364.

27. **Contracts**—Offer and Acceptance.—When it does not appear that there were other conditions of an intended agreement beyond those expressed in an offer and acceptance, held, that it cannot be said as a matter of law that the minds of the parties had not met upon a completed contract.—Beach & Clarridge Co. v. American Steam Gauge & Valve Mfg. Co., Mass., 80 N. E. 924.

28.——Rights of Third Person.—One not a party to a contract given to another for his benefit cannot ordinarily sue at law in his own name.—George H. Sampson Co. v. Commonwealth, Mass., 88 N. E. 911.

29.——Right of Third Person to Sue.—A third person may sue on a contract made for his benefit, though he was not named in it, if it was not merely for indemnity.—Bank of Laddonia v. Bright-Coy Commission Co., Mo., 120 S. W. 648.

30.——Signature of One Party.—A written contract not required to be in writing is valid, if one of the parties signs it and the other acquiesces therein.—Parker v. Carter, Ark., 120 S. W. 836.

31. **Copyrights**—Extent of Rights Acquired.—Conceding the right of the official reporter of the Supreme Court of the United States to secure a copyright on his work in the volumes of published reports, the mere arrangement of reported cases in sequence, their paging and distribution into volumes, are not features of such importance as to entitle him to copyright protection of such details.—Banks Law Pub. Co. v. Lawyers' Co-operative Pub. Co., U. S. C. C. of App., Second Circuit, 169 Fed. 386.

32. **Corporations**—By-Laws.—By-laws duly adopted by a corporation are obligatory on all the members thereof, and all the members are chargeable with knowledge thereof.—Smoot v. Bankers' Life Ass'n, Mo., 120 S. W. 719.

33.——Rights of Stockholders.—The control of the majority of the stockholders of a corporation will not be interfered with, unless its acts are illegal.—Gregg v. Truth Printing & Pub. Co., La., 48 So. 632.

34.——Sale of Stock.—Where plaintiff purchased certain worthless bank stock from defendant without guaranty or representation as to its value, and defendant did not know the stock was worthless, plaintiff could not recover the price.—Field v. Turley, Ky., 120 S. W. 338.

35.——Service on Foreign Corporation.—After a foreign corporation temporarily present at one time in the state has left and taken with it its holdings, it cannot be served through the Secretary of State.—Gouner v. Missouri Valley Bridge & Iron Co., La., 48 So. 657.

36.——Suit for Infringement.—A corporation charged with infringement of a patent is not estopped to deny its validity merely because the patentee who sold and assigned it is subordinate in its employment.—Babcock & Wilcox Co. v. Toledo Boiler Works Co., U. S. C. C. of App., Sixth Circuit, 170 Fed. 81.

37.——Unpaid Subscriptions.—Unpaid subscriptions on capital stock of a corporation constitute a trust fund for the benefit of creditors.—State ex. rel. House Wrecking, Salvage & Lumber Co. v. Goodrich, Mo., 120 S. W. 646.

38. **Covenants**—Running With Land.—Covenants of general warranty in a deed to real property run with the land, and being in rem, differ in the rules by which they are controlled from obligations in personam.—Sperry v. Cook, Mo., 120 S. W. 654.

39. **Criminal Trial**—Authority to Set Aside Verdict.—The court may set aside a verdict of acquittal of an offense punishable by fine only.—Fenix v. State, Ark., 120 S. W. 388.

40.——Severance.—Where two persons are indicted as principals, accomplices, or accessories, they are particeps criminis to the main offense, and are entitled to a severance on a proper showing.—Anderson v. State, Tex., 120 S. W. 462.

41. **Death**—Negligence.—Adult children not dependent on their father for support, and not receiving anything from him for their support, cannot recover for his negligent death.—Missouri, K. & T. Ry. Co. of Texas v. James, Tex., 120 S. W. 269.

42. **Dedication**—Elements.—In order to constitute a dedication, it must appear that the owner intended absolutely and irrevocably to

set apart the land for public use.—City of Atlanta v. Texas & P. Ry. Co., Tex., 120 S. W. 923.

43. **Deeds**—Absence of Proof.—A deed, in the absence of proof to the contrary, is presumed to have been delivered on the day of its date, though it appears to have been acknowledged at a subsequent date.—Harriman Land Co. v. Hilton, Tenn., 120 S. W. 162.

44.——Forgery.—That a deed is accompanied by a forged grant held some evidence that it was forged.—West v. Houston Oil Co. of Texas, Tex., 120 S. W. 228.

45. **Equity**—Conclusiveness of Jury Verdict.—Where, in an equity suit, the issue of fact is submitted to a jury, it is the province of the court to adopt or reject their verdict.—Blood v. Sovereign Camp W. of W., Mo., 120 S. W. 700.

46. **Estoppel**—Acts Constituting.—One will be estopped from repudiating an act on which another has relied.—Fagan v. Stuttgart Normal Institute, Ark., 120 S. W. 404.

47. **Evidence**—Admissibility.—In an action by one partner against a copartner to recover his share of the net profits of the partnership during a certain year, evidence as to the profits and losses of the business during another year was inadmissible.—Hatzford v. Walsh, Tex., 120 S. W. 525.

48.——Declarations Against Interest.—Statements made by a party to a suit against his interest touching material facts are competent as original testimony.—Black v. Epstein, Mo., 120 S. W. 754.

49.——Hypothetical Questions.—Hypothetical questions to an expert witness must be so framed as to reflect the party's theory as shown by the facts admitted or proved by him.—Landis & Schick v. Watts, Neb., 121 N. W. 980.

50.——Relevancy.—In a suit to set aside a conveyance as fraudulent against creditors, the character of the grantor and grantee for fair dealing is not in issue.—Black v. Epstein, Mo., 120 S. W. 754.

51.——Subornation of Witnesses.—Misconduct of a party in attempting to suborn witness is admissible as an admission that his claim is false and unjust.—Commonwealth v. Min Sing, Mass., 88 N. E. 918.

52. **Executors and Administrators**—Employment of Attorney.—Under the statute the administrator of an estate having no means held authorized to contract with an attorney on a contingent basis to enforce a claim in favor of the estate.—Pennebaker v. Williams, Ky., 120 S. W. 321.

53.——Sale of Real Estate.—The purchaser of land at an administrator's sale acquires an equitable title, though he does not obtain a deed from the administrator.—Edwards v. Gates, Tex., 120 S. W. 585.

54. **Federal Courts**—Authority of State Court Decisions.—The construction which the courts of a state have placed upon its statutes of fraud is binding upon the federal courts.—Walker v. Hafer, U. S. C. C. of App., Sixth Circuit, 170 Fed. 37.

5.——Jurisdiction.—A federal court cannot grant an injunction to restrain proceedings in a state court, unless necessary for the exercise of its own jurisdiction, previously obtained.—Potter v. Selwyn & Co., U. S. C. C., S. D. N. Y., 169 Fed. 223.

56. **Fire Insurance**—Value of Property at Time of Fire.—Under a fire insurance policy which limits the liability of the insurer to the actual cash value of the property insured at the time the loss or damage occurs, the extent of the liability is not the cash value at the time the property is exposed to the danger of loss by the outbreak of fire, but the actual cash value at the time the loss occurs, which is necessarily to be referred, if material, to the time when in point of fact, as nearly as can be ascertained, the fire reaches and consumes or damages it.—Liverpool, London & Globe Ins. Co. v. McFadden, U. S. C. C. of App., Third Circuit, 170 Fed. 179.

57. **Fixtures**—Oil and Gas Lease.—Machinery and fixtures placed on real estate for operation under an oil and gas lease do not become permanent fixtures, so as to vest in the lessor on forfeiture of the lease.—Perry v. Acme Oil Co., Ind., 88 N. E. 859.

58. **Fraudulent Conveyances**—Intent.—A sale of goods, to be fraudulent as to creditors, must be made with the fraudulent intent to cheat, hinder, or delay them.—McComb v. Judsonia State Bank, Ark., 120 S. W. 844.

59. **Garnishment**—Credits of Debtor.—That a credit of a debtor may be subject to garnishment, it must be both legally and equitably due to him.—Wheless v. Meyer & Schmid Grocer Co., Mo., 120 S. W. 708.

60.——Judgment.—A judgment against a garnishee cannot be lawfully rendered until judgment has been rendered against defendant in the main action.—St. Louis, I. M. & S. Ry. Co. v. McDermitt, Ark., 120 S. W. 831.

61. **Husband and Wife**—Presumption of Ownership.—That a grocery store was conducted in the wife's name, and the bank account so kept, held sufficient to create a presumption of ownership by her.—Johnson v. Johnson's Adm'r, Ky., 120 S. W. 303.

62.——Separate Property of Wife.—A husband, who executes a note to his wife for money received by her as heir of her mother, held to thereby make the note her separate property.—Bennett v. Bennett's Adm'r, Ky., 120 S. W. 372.

63. **Injunction**—Remedy at Law.—A contestant in a contest by a newspaper for increasing its subscribers held to possess an adequate remedy at law, and equity will not interfere.—McDaniel v. Orner, Ark., 120 S. W. 829.

64. **Interpleader**—Nature of Claim.—It is no valid objection to a bill of interpleader that a particular claimant claims less of the particular funds than the whole amount tendered into court.—Rochelle v. Pacific Express Co., Tex., 120 S. W. 543.

65. **Judges**—Disqualification.—A judge holding a benefit certificate in a mutual benefit society held disqualified to preside in an action against the society.—Sovereign Camp, Woodmen of the World, v. Hale, Tex., 120 S. W. 539.

66. **Judgment**—Invalidity.—Where, under a warrant of attorney authorizing the confession of judgment, the court enters a judgment which appears on its face to have been entered after a trial in which evidence was heard, the judgment is invalid.—First Nat. Bank v. White, Mo., 120 S. W. 36.

67.——When Procured by Fraud.—A motion lies to set aside a judgment procured by fraud, though a bill in equity or a writ of error coram

nobis also lies.—Graff v. Dougherty, Mo., 120 S. W. 661.

68. **Justices of the Peace**—Power to Punish.—A justice of the peace is not civilly liable for fining a party for contempt, though his action is erroneous or corrupt.—Early v. Fitzpatrick, Ala., 48 So. 686.

69. **Landlord and Tenant**—Lien for Supplies.—A landlord, who furnishes supplies to enable the tenant to make a crop, is entitled to a lien for the price thereof, and it is immaterial whether the tenant could or could not have made the crop without them.—Ferniman v. Nowlin, Ark., 120 S. W. 378.

70. **Libel and Slander**—Damages.—In an action by a private citizen against a newspaper for libel, the defense of privilege, fair criticism, or proper comment held unavailable.—Pfister v. Milwaukee Free Press Co., Wis., 121 N. W. 938.

71. **Life Insurance**—Forfeitures.—Where parties to a life insurance contract stipulate for forfeitures, the courts must sustain forfeitures and enforce the contract in the absence of fraud or misrepresentation.—Smoot v. Bankers' Life Ass'n, Mo., 120 S. W. 719.

72. **Limitation of Action**—Liquor Dealers' Bond.—An action on a liquor dealer's bond for selling liquor to a minor is an action for debt not evidenced by a contract in writing and is therefore barred after two years.—Hillman v. Gallagher, Tex., 120 S. W. 505.

73. **Master and Servant**—Assumed Risk.—A servant held not negligent in continuing to work in a railroad gravel pit under a dangerous ledge at a point where he was directed to work by his foreman.—St. Louis, Southwestern Ry. Co. of Texas v. Marshall, Tex., 120 S. W. 512.

74.——Duty to Instruct a Servant.—A master need not instruct his servant as to the existence of danger, unless it is reasonably to be apprehended.—Glenesky v. Kimberly & Clark Co., Wis., 121 N. W. 893.

75.——Injury to Servant.—In an action by a boy 14 years old against his employer to recover for a personal injury, the questions of negligence contributory negligence, and assumption of risk held properly submitted to the jury.—Standard Silk Co. v. Force, U. S. C. C. of App., Second Circuit, 170 Fed. 184.

76.——Questions for Jury.—Negligence is for the jury, not only where there is room for difference of opinion between reasonable men as to the existence of facts from which negligence is sought to be inferred, but also where there is a difference as to the inferences which might be drawn from conceded facts.—Pacific Telephone & Telegraph Co. v. Parmenter, U. S. C. C. of App., Ninth Circuit, 170 Fed. 140.

77. **Monopolies**—Right to Sue.—A member of a trust to regulate and control the price of coal held entitled to sue a carrier for its failure to furnish cars for the shipment of coal, notwithstanding the state and federal anti-trust acts.—Midland Valley R. Co. v. Hoffman Coal Co., Ark., 120 S. W. 380.

78. **Mortgages**—Default in Payment of Taxes.—A mortgage may be foreclosed by an assignee for a default in the payment of taxes occurring before the assignment.—Gerrity v. Wareham Sav. Bank, Mass., 88 N. E. 1084.

79.——Duress.—Where notes and a trust deed were extorted by defendant, without consideration, from a borrower as additional compensation for securing a loan, which was needed immediately to redeem land from foreclosure, after defendant had agreed to procure the loan for a consideration which had already been paid, equity will decree a cancellation of the notes and trust deed.—Lappin v. Crawford, Mo., 120 S. W. 605.

80. **Municipal Corporations**—Change of Grade.—Although the grade of a street is established by ordinance, it is also necessary that the change to the established grade should also be made under authority of an ordinance.—Powell v. City of Excelsior Springs, Mo., 120 S. W. 106.

81.——Duty Toward Pedestrians.—A city is not bound to protect pedestrians against extraordinary or unlikely conditions.—Smith v. City of Yankton, S. D., 121 N. W. 848.

82.——Negligence.—A municipality is liable for damages from an accident, the result of two concurrent causes, though one of them is a cause over which it has no control, provided it is a cause which it should have anticipated and should have guarded against.—Smith v. City of Yankton, S. D., 121 N. W. 848.

83.——Paving Contractor.—A municipal contractor, after the completion and acceptance of street paving under a void contract, could not recover therefor under a quantum meruit.—Cawker v. Central Bitulithic Paving Co., Wis., 121 N. W. 888.

84. **Negligence**—Contributory Negligence of Child.—The question whether a child is guilty of contributory negligence, after proof that he has sufficient discretion to make a failure to use due care contributory negligence, held for the jury.—Potera v. City of Brookhaven, Miss., 49 So. 617.

85.——Proximate Cause.—The liability of one charged with negligence does not depend on the question whether in the exercise of reasonable prudence he could or ought to have foreseen the very injury complained of, but he may be held liable for anything which, after the injury is complete, appears to have been the natural and probable consequence of his act or omission.—Buckner v. Stockyards Horse & Mule Co., Mo., 120 S. W. 766.

86.——Violation of Speed Ordinance.—The running of a train in violation of a valid speed ordinance is negligence per se, warranting a recovery for injuries to an employee proximately caused thereby.—Cleveland, C., C. & St. L. Ry. Co. v. Powers, Ind., 88 N. E. 1073.

87.——Violation of Statute.—A violation of a statutory mandate is ordinarily negligence per se.—Pittsburg, C., C. & St. L. Ry. Co. v. Reed, Ind., 88 N. E. 1080.

88. **Parties**—Pleading.—Objection for nonjoinder of parties must be raised by plea or demurrer.—National Handle Co. v. Huffman, Mo., 120 S. W. 690.

89. **Partnership**—Partnership Claim.—Partners are necessary parties in an action to enforce a partnership claim and should be made parties for the protection of defendant therein against further litigations.—Leola Lumber Co. v. Bozarth, Ark., 120 S. W. 152.

90.——Splitting Cause of Action.—To permit a surviving partner to urge his individual interest in a firm demand as a counterclaim in a suit on a firm debt, would amount to the splitting of a cause of action.—National Handle Co. v. Huffman, Mo., 120 S. W. 690.

91.——Tenancy in Common.—A mere community of interest by ownership of property creates a tenancy in common, but not a partnership.—La Cotts v. Pike's Estate, Ark., 120 S. W. 144.

92.——Implied Power of Partner.—The implied power of each partner to receive payment of and collect firm debts results from his general agency for the firm.—Progressive Lumber Co. v. Rogers & Croley, Tex., 120 S. W. 260.

93. **Party Walls**—Rights of Parties.—Where one party to a party wall agreement maintains shutters and a sign projecting over plaintiff's lot, on which the wall does not rest, an order for restitution of the premises and removal of the shutters held proper.—Stein v. The Golden Rule, Minn., 121 N. W. 880.

94. **Patents**—Infringement.—A purchaser in a foreign country of an article patented in the United States, although from one there authorized to sell it, who brings it into the United States and uses it here, is chargeable with infringement of the United States patent.—Daimler Mfg. Co. v. Conklin, U. S. C. C. of App., Second Circuit, 170 Fed. 70.

95.——Infringement.—The inventor of a prac-

tical working machine will not be held to have infringed a prior patent for an unsuccessful machine, which in fact added nothing substantial to the art, merely because its claims are broad enough to cover the successful structure.—Lovell v. Seybold Mach. Co., U. S. C. C. of App., Second Circuit, 169 Fed. 288.

96.——Novelty.—The validity of a patent for a product or structure is not affected by the process or means by which it is made or whether it is made by hand or by machinery.—American Steel & Wire Co. v. Denning Wire & Fence Co., U. S. C. C. of App., Eighth Circuit, 169 Fed. 413.

97. **Payment**—Conditional Order.—A conditional order or third person after acceptance held not an absolute satisfaction of the original debt.—Matney v. Abshire's Adm'r, Ky., 120 S. W. 274.

98. **Perpetuities**—Validity.—A remainder is void if there is any certainty that it may not vest at the end of a life or lives in being, and 21 years and 10 months thereafter.—United States Fidelity & Guaranty Co. v. Douglas' Trustee, Ky., 120 S. W. 328.

99. **Pleading**—Amendment to Conform to Proof.—An amendment will not be permitted to make a pleading conform to the evidence admitted over objection.—Leggat v. Palmer, Mont., 102 Pac. 327.

100.——Conclusion of Law.—A bill to enjoin a judgment alleging that the judgment was void, but setting out no facts to show that it was void, held insufficient to authorize relief.—New York Chemical Co. v. Spell Bros., Tex., 120 S. W. 579.

101.——Demurrer.—A demurrer does not lie to challenge the sufficiency of a mere motion.—Graff v. Dougherty, Mo., 120 S. W. 661.

102.——Motion to Strike Out.—There is a clear distinction in the functions performed by a motion to strike out a pleading and a demurrer thereto.—Southern Home Ins. Co. v. Putnal, Fla., 49 So. 922.

103. **Pledges**—Liability of Pledgee.—A pledgee must account to the pledgor for all profits derived by him from the pledged property.—Leggat v. Palmer, Mont., 102 Pac. 327.

104.——To Cover Future Advances.—A contract of pledge may authorize the pledgee to hold the property for other existing debts and future advances.—Union Brewing Co. v. Interstate Bank & Trust Co., Ill., 88 N. E. 997.

105. **Principal and Surety**—Notice to Sureties.—Sureties in a bond conditioned on the principal therein performing certain acts enumerated are not entitled to notice of the acceptance of the bond by the obligee therein.—Haupt v. James Cravens & Co., Tex., 120 S. W. 541.

106. **Process**—Order of Publication.—An order of publication is void where it names only the defendant not personally served, omitting the resident defendant.—Van Natta v. Harroun Real Estate Co., Mo., 120 S. W. 738.

107. **Public Lands**—What Law Governs.—The estate created by a 99-year lease of Mississippi school lands must be determined by the law of Mississippi.—Simpson County v. Wisner-Cox Lumber & Mfg. Co., U. S. C. C. of App., Fifth Circuit, 170 Fed. 52.

108. **Railroads**—Carrying Passengers Beyond Station.—Where a carrier fails to stop a reasonable length of time, carried a passenger beyond his station, and on request negligently fails to return to the station, it cannot defend against an action for injuries thereby occasioned, though the passenger on account of the carrier's negligence may have voluntarily left the train with a view of returning to the station.—Freeman v. Puckett, Tex., 120 S. W. 514.

109.——Duty to Look and Listen.—A person crossing railroad tracks over a busy street is not under an absolute duty to look and listen, irrespective of a reasonable excuse for not doing so.—Nilson v. Chicago, B. & Q. R. Co., Neb., 121 N. W. 1128.

110.——Fences and Cattle Guards.—If a railroad company erects a sufficient fence and gate and keeps it in repair, the landowner must keep it closed and cannot recover against the company for injury to stock caused by his failure to do so.—Texas Cent. R. Co. v. Jenkins, Tex., 120 S. W. 948.

111.——Knowledge of Passenger as to Schedule.—The holder of a railroad ticket is bound to inform himself, before taking passage, as to whether the train is scheduled to stop at his destination.—Dillman v. Chicago, I. & L. Ry. Co., Ind., 80 N. E. 873.

112.—Passenger Mislaying Ticket.—Where a passenger stated to the conductor that he had mislaid his ticket, it was the conductor's duty to give him a reasonable time in which to find it before ejecting him.—Anderson v. Louisville & N. R. Co., Ky., 120 S. W. 298.

113.——Passengers Riding on Platform.—A passenger on a railroad train is not necessarily negligent as a matter of law, in going on the platform of a car while the train is in motion.—Thomas v. San Pedro, L. A. & S. L. Ry. Co., U. S. C. C. of App., Ninth Circuit, 169 Fed. 129.

114. **Removal of Causes**—Time of Filing Petition.—The time for the filing of a petition to remove a cause to the federal court is not extended by an extension of the statutory time in which to answer.—Midland Valley R. Co. v. Hoffman Coal Co., Ark., 120 S. W. 380.

115. **Sales**—Delivery.—Under a contract of the sale of coal by plaintiff to defendant, delivery to a certain carrier at the point of shipment held to constitute delivery to defendant.—Cluley-Miller Coal Co. v. Freund Packing Co., Mo., 120 S. W. 658.

116.——Stoppage in Transitu.—While the seller's lien continues only so long as he retains actual custody of the goods, his right of stoppage in transitu continues until actual delivery is made to the consignee.—Wheless v. Meyer & Schmid Grocer Co., Mo., 120 S. W. 708.

117.——Time for Delivery.—Where a contract of sale fails to specify time of delivery, held, the law will fix a reasonable time.—Hughes Mfg. & Lumber Co. v. Parker-Bell Lumber Co., Wash., 102 Pac. 433.

118. **Set-off and Counterclaim**—Recoupment by Surety.—In an action against defendant for the value of material furnished another under contract for use in erecting a building for defendant, for which materials defendant agreed to be liable, defendant could, with the consent of such other, recoup any damages the latter had sustained by reason of plaintiff's delay in delivering the material, etc.—Merchants' Bank v. Acme Lumber & Mfg. Co., Ala., 49 So. 782.

119. **Specific Performance**—Contracts Enforceable.—A bill for specific performance of an equitable contract must be supported by evidence establishing the contract substantially as stated.—Stott v. Avery, Mich., 121 N. W. 825.

120.——Exchange of Property.—Contract for exchange of property failing to specify with reasonable certainty the rights, duties, and obligations of each of the parties held insufficient to justify a decree for specific performance.—McCauley v. Schatzley, Ind., 88 N. E. 972.

121. **Street Railroads**—Frightening of Horse.—If a driver knows that a horse is likely to become frightened at street cars, he drives on a street having a car line thereon at his own risk.—Turner v. Southwest Missouri R. Co., Mo., 120 S. W. 128.

122. **Tenancy in Common**—Partition.—Partitioning of land by certain co-tenants among themselves ignoring another co-tenant held to constitute an ouster and start the running of limitations as against him.—Honea v. Arledge, Tex., 120 S. W. 508.

123. **Vendor and Purchaser**—Adverse Possession.—Occupancy of land under a specific claim is constructive notice of the title on which the claim is based, though unrecovered.—Hayward Lumber Co. v. Bonner, Tex., 120 S. W. 577.

124. **Wills**—Surrounding Circumstances.—The material circumstances in the light of which a will was executed may be looked to, to comprehend its meaning.—Ware v. Minot, Mass., 88 N. E. 1091.

125.——Testamentary Capacity.—That one is prejudiced against the natural objects of his bounty, without sufficient ground, does not necessarily show want of testamentary capacity.—Drum v. Capps, Ill., 88 N. E. 1020.